A **PROJEK LINTASAN KOTA SDN BHD**

v.

WISMA DENMARK SDN BHD & ANOR

B HIGH COURT MALAYA, KUALA LUMPUR
VAZEER ALAM MYDIN MEERA JC
[CIVIL SUIT NO: 21NCVC-98-2011]
28 MAY 2012

C ***LAND LAW:*** *Acquisition of land - Compensation - Appeal against - Challenging validity of process of acquisition - Land reference - Application made outside statutory six months period - Whether court deprived of jurisdiction to entertain reference - Whether mere vain attempt to challenge quantum of award on false pretense - Whether plaintiff* D *estopped by its unconscionable conduct - Land Acquisition Act 1960, ss. 38(5), (7), 49(1), 68*

LAND LAW: *Acquisition of land - Validity - Challenging validity of process of acquisition - Land reference - Application made outside* E *statutory six months period - Whether court deprived of jurisdiction to entertain reference - Whether court has discretion to grant extension of time - Whether mere vain attempt to challenge quantum of award on false pretense - Whether plaintiff estopped by its unconscionable conduct - Land Acquisition Act 1960, ss. 38(5), (7), 49(1), 68*

F The plaintiff entered into a concession agreement with the government of Malaysia to build, operate and transfer the Ulu Kelang/Ampang-Kuala Lumpur Elevated Highway (AKLEH). The plaintiff was to identify the lands needed for the construction and the government was to make the lands available through G acquisition. All costs, expenses and charges incurred for the acquisition were to be borne by the plaintiff and the government would pay up to RM70 million on the plaintiff's behalf for the land costs which the plaintiff would reimburse later. Two tracts of land belonging to the first defendant were then compulsorily H acquired by the government for the AKLEH project through the second defendant for the benefit of Lembaga Lebuhraya Malaysia (LLM), the authority entrusted to monitor the works and administration of highways in Malaysia. Throughout the entire acquisition exercise, up till the order of court dated 29 November I 2010 ("the award"), the plaintiff did not retain solicitors to act on its behalf. The plaintiff was content to allow LLM to take the lead

and represent their interest in the proceedings. The award was, pursuant to the terms of the concession agreement, forwarded to the plaintiff and the plaintiff was notified that the plaintiff as concessionaire was required to pay the additional compensation of RM6,055,193.36 as well as late payment interest charges in the sum of RM6,475,241.29 as at 14 March 2011. The plaintiff refused to pay as per the award and instead commenced this suit challenging the validity of the award on the grounds that the High Court had no jurisdiction to hear the land reference as it was in contravention of the Land Acquisition Act 1960 ("LAA"). It was not disputed that the land reference was made by the second defendant outside the six months period stipulated in s. 38(5) and the second defendant did not apply for an extension of time to file the Form O pursuant to s. 38(6). The plaintiff in any case averred that: (i) the second defendant was in breach of its statutory duties under ss. 38(5), 38(6), 43 and 44(2) of the LAA; and (ii) there was a breach of natural justice. Hence, the plaintiff sought that the award be set aside *ex-debito justitiae*. The defendants claimed, *inter alia*, that the plaintiff was barred by s. 68 of the LAA from instituting this suit. The first defendant also filed a counterclaim against the plaintiff for the tort of abuse of process.

Held (dismissing the plaintiff's claim; allowing first defendant's counterclaim with cost):

(1) Section 68 of the LAA has been construed by the courts to mean that civil proceedings to set aside an award under the LAA are barred. The exception to this bar being *certiorari* proceedings to challenge the process of acquisition and not the award itself; *Pemungut Hasil Tanah, Daerah Barat Daya, Penang v. Kam Gin Paik & Ors* (refd). (para 11)

(2) Section 38(5) LAA merely prescribes a procedural time frame for references to be made to the court. Section 38(7) of the LAA also gives the court unfettered discretion to grant extension of time for the filing of Form O. Section 38(5) does not prohibit a reference from being made beyond the prescribed six months. Any contravention of s. 38(5) of the LAA in respect of time does not mean that the court is deprived of its jurisdiction to entertain the reference. Therefore, the non-filing of Form O within the six months period did not have the effect of negating jurisdiction. The High Court was seized with jurisdiction to hear and determine the reference. (para 16)

(3) This suit was but a vain attempt to challenge the award on false pretense when faced with a marked increase in the amount of compensation awarded by the court as well as the huge interest payable. The plaintiff was dissatisfied with the quantum of award of compensation. This suit was an attempt to circumvent the proviso to s. 49(1) of the LAA. (para 33)

(4) The plaintiff was guilty of unconscionable and unmeritorious conduct. Equity will not allow a statute from being used as an engine of fraud. Fraud here was constructive or equitable fraud arising from the plaintiff's unmeritorious and unconscionable conduct. The plaintiff was thus estopped by its unconscionable or unmeritorious conduct from pursuing this claim; *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* (refd); *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* (refd). (para 37)

(5) There was no injustice caused to the plaintiff and the filing of the Form O beyond the six months period did not render the land reference a nullity as contended by the plaintiff. The plaintiff failed to prove its pleaded case. (para 49)

(6) The first defendant had proved all the elements of the tort of abuse of process. The purpose of this suit was not to seek genuine legal redress but merely to avoid liability under the concession agreement and to circumvent the proviso to s. 49(1) of the LAA. This is but a clear attempt by the plaintiff to take a second shot at the award of increased compensation to the first defendant by the court. (para 51)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Asia Pacific Land Berhad & 5 Ors v. Datuk Bandar Kuala Lumpur [2005] 1 LNS 253 HC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd [1999] 1 CLJ 179 CA ***(refd)***

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA ***(refd)***

Chua Ngin Khai & Anor v. Pentadbir Tanah Daerah Pontian, Johor & Anor [1996] 1 LNS 298 HC ***(refd)***

Hamidon Ahmad v. Collector of Land Revenue, Jasin [1969] 1 LNS 51 HC ***(refd)***

Hu Sepang v. Inspector Keong On Eng & Ors [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739 HC ***(refd)***

Lim Cheng Chuan Realty Co Sdn Bhd v. Kerajaan Negeri Pulau Pinang [1999] 7 CLJ 499 HC ***(refd)***

London & Clydeside Estates Ltd v. Aberdeen District Council & Anor [1980] 1 WLR 182 ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(refd)***

Mokhtar Amin v. Mohamed Moktar Omar [2001] 4 CLJ 489 CA ***(refd)***

Ng Kim Moi & Ors v. Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus [2004] 3 CLJ 131 CA ***(refd)***

Oriental Rubber & Oil Palm Sdn Bhd v. Pemungut Hasil Tanah, Kuantan [1983] 2 CLJ 30; [1983] CLJ (Rep) 677 HC ***(refd)***

Pemungut Hasil Tanah, Daerah Barat Daya, Penang v. Kam Gin Paik & Ors [1986] 1 CLJ 283; [1986] CLJ (Rep) 33 PC ***(refd)***

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee [1983] 1 LNS 14 FC ***(refd)***

Pow Hing & Anor v. Registrar of Titles, Malacca [1980] 1 LNS 120 FC ***(refd)***

Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd [1985] 1 CLJ 541; [1985] CLJ (Rep) 266 FC ***(refd)***

Reg v. Home Secretary For The Home Department, Ex parte Jeyeanthan [2000] 1 WLR 354 ***(refd)***

Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***

Tradium Sdn Bhd v. Zain Azahari Zainal Abidin & Anor [1996] 2 CLJ 270 CA ***(refd)***

Legislation referred to:

Federal Constitution, arts. 8, 13

Government Proceedings Act 1956, s. 33

Land Acquisition Act 1960, ss. 37(1), 38(3)(b), (5), (6), (7), 43, 44(2), 49(1), 68

Other source(s) referred to:

Clerk & Lindsell on Torts, 18th edn, p 599

For the plaintiff - Nazariah Abas; M/s Nazariah Abas & Co

For the first defendant - Su Tiang Joo (K L Pang & Shelby Chuin with him); M/s Cheah Teh & Su

For the second defendant (Law Administrator, Kuala Lumpur) - Narkunavathy Sundareson (Kong Siew Chuo with her) FCs

[Editor's note: For decision on Land Reference and Award of Compensation, please see judgment of Prasad Sandosham Abraham JC vide Wisma Denmark Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur [2012] 7 CLJ 94]

Reported by Amutha Suppayah

JUDGMENT

Vazeer Alam Mydin Meera JC:

[1] The facts of the case have been well summarised by counsel for the 1st and 2nd defendants in their written submissions and I have adopted them in extenso here.

[2] The plaintiff entered into a concession agreement dated 16 May 1996 with the Government of Malaysia to build, operate and transfer the Ulu Kelang/Ampang-Kuala Lumpur Elevated Highway (AKLEH). The relevant terms of the concession agreement include:

(i) the plaintiff would design, construct, manage and maintain AKLEH;

(ii) the plaintiff was to identify the lands needed for the construction and the government was to make the lands available through acquisition;

(iii) all costs, expenses and charges incurred for the acquisition were to be borne by the plaintiff; and

(iv) the Government of Malaysia would pay up to RM70 million on the plaintiff's behalf for the land costs which the plaintiff would reimburse later.

[3] Two tracts of land belonging to the 1st defendant identified as Lots 39 (Lot Baru 50) and 38 Section 45, Jalan Ampang, Bandar Kuala Lumpur held under Grant No. 27733 and 27736 respectively were compulsorily acquired by the Government of Malaysia for the AKLEH project through the 2nd defendant for the benefit of Lembaga Lebuhraya Malaysia (LLM), the authority entrusted to monitor the works and administration of highways in Malaysia.

[4] The chronology of events pertaining to the land acquisition is as follows:

Date	Event
31 October 1996	Form D - 'Perisytiharan Pengambilan Yang Dicadangkan' was issued.
17 November 1996	Form D was published in the Federal Government Gazette.
9 December 1996	Form E - 'Pengambilan Yang Dicadangkan: Pemberitahuan Siasatan' was issued. According to Form E the inquiry would be held before the Land Administrator on 21 January 1997.
11 December 1996	Form F - 'Pemberitahuan Menghendaki Keterangan Bertulis' was issued.
21 January 1997	Inquiry before the Land Administrator took place on 21 January 1997. According to the notes of proceedings recorded by the Land Administrator: (i) the attendees included representatives from LLM and two representatives of the plaintiff, ie, Mohd Kamarudin bin Kamarulzaman and Ahmad Rohjan. (ii) The inquiry was adjourned to another date to be fixed pending the 1st defendant's valuation report.
27 August 1997	The inquiry continued and according to the notes of proceedings recorded by the Land Administrator: (i) the attendees included a representative from LLM and one Mohd Kamarudin Kamarulzaman representing the plaintiff; (ii) the 1st defendant's valuer gave evidence claiming compensation in excess of RM37 million; (iii) the representative of the plaintiff did not give any evidence.

24 September 1997	The Land Administrator delivered his award quantifying the compensation at RM13,091,526.64 and the 'Pemberitahuan Bertulis Pampasan' in Form G was issued on the same day without naming the plaintiff as one of the 'Orang-orang yang berkepentingan'.
29 September 1997	The 1st defendant was notified of the Land Administrator's Award by the 'Pemberitahuan Pemberian Dan Tawaran Pampasan' in Form H. Again the plaintiff was not named as one of the 'Orang-orang yang berkepentingan'.
1 November 1997	Being dissatisfied with the 2nd defendant's award, the 1st defendant accepted the compensation under protest by filing the Form N – 'Permohonan Supaya Bantahan Dirujukkan Kepada Mahkamah'. This objection in Form N was made within the time frame of 'six weeks of receipt of the notice from the Land Administrator' as prescribed under s. 38(3)(b) of the Land Acquisition Act 1960 (LAA) which expired on 10 November 1997.
4 November 1997	The 2nd defendant took formal possession of the acquired lands by issuance of the 'Pemberitahuan Bahawa Tanah Telah Diambil Milik' in Form K.
28 September 2007	The 2nd defendant filed Form O to have the matter referred to the Kuala Lumpur High Court. The reference was registered as Land Reference No. S2-15-13-2007 (land reference).

29 November 2010	The land reference was heard before YA Dr Prasad Abraham assisted by two Assessors in the presence of counsel for both defendants. The court ordered the 2nd defendant to pay additional compensation in the sum of RM6,055,193.36 with late payment charges at 8% per annum thereon from 4 November 1997 (the date of taking possession of the lands) to date of full settlement.

[5] It is pertinent to note that throughout the entire acquisition exercise, up till the order of court dated 29 November 2010 was made the plaintiff did not retain solicitors to act on its behalf. The plaintiff was content to allow LLM (as the acquiring authority) to take the lead and represent their interest in the proceedings.

[6] The sealed order of court dated 29 November 2010 (court's award) was, pursuant to the terms of the concession agreement, forwarded to the plaintiff *via* LLM's letter dated 31 March 2011. The plaintiff was notified that the plaintiff as concessionaire was required to pay the additional compensation of RM6,055,193.36 as well as late payment interest charges in the sum of RM6,475,241.29 as at 14 March 2011.

[7] The plaintiff refused to pay as per the order. Instead, the plaintiff commenced this suit against the 1st and 2nd defendants challenging the validity of the order dated 29 November 2010 on the grounds that the High Court had no jurisdiction to hear the land reference as it was in contravention of the LAA. The plaintiff further averred that:

(i) the 2nd defendant was in breach of its statutory duties under ss. 38(5), 38(6), 43 and 44(2) of the LAA;

(ii) there was a breach of natural justice;

(iii) the plaintiff had a legitimate expectation that the 2nd defendant would comply with the provisions of the LAA; and

(iv) there was an infringement of the plaintiff's rights under arts. 8 and 13 of the Federal Constitution.

[8] In that premise, the plaintiff sought the following relief:

(i) that the order dated 29 November 2010 be set aside *ex-debito justitiae*;

(ii) that the 2nd defendant be restrained and injuncted from executing the said order;

(iii) general, aggravated and exemplary damages; and

(iv) cost.

[9] The defendants in their defence deny the plaintiff's claim and maintain that:

(i) the plaintiff was barred by s. 68 of the LAA from instituting this suit;

(ii) the 2nd defendant did not owe the plaintiff any statutory duty;

(iii) at all material times, the plaintiff was aware of the land reference;

(iv) the plaintiff could not reasonably have any legitimate expectation of the 2nd defendant;

(v) there was no issue of any infringement of the plaintiff's rights under arts. 8 or 13 of the Federal Constitution.

[10] The 1st defendant also filed a counterclaim against the plaintiff for the tort of abuse of process and seeks damages in this regard.

[11] Let me consider the first issue, which is, whether the plaintiff is precluded by s. 68 of the LAA to set aside the court's award by this suit? Section 68 reads:

> No suit shall be brought to set aside an award or apportionment under this Act.

This provision has been construed by the courts to mean that civil proceedings to set aside an award under the LAA are barred. (See *Lim Cheng Chuan Realty Co Sdn Bhd v. Kerajaan Negeri Pulau Pinang* [1999] 7 CLJ 499; *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* [1983] 1 LNS 14; *Oriental Rubber & Oil Palm Sdn Bhd v. Pemungut Hasil Tanah, Kuantan*

[1983] 2 CLJ 30; [1983] CLJ (Rep) 677; *Pemungut Hasil Tanah, Daerah Barat Daya, Penang v. Kam Gin Paik & Ors* [1986] 1 CLJ 283; [1986] CLJ (Rep) 33.) The exception to this bar being *certiorari* proceedings to challenge the process of acquisition and not the award itself. See the case of *Pemungut Hasil Tanah, Daerah Barat Daya, Penang v. Kam Gin Paik & Ors* [1986] 1 CLJ 283; [1986] CLJ (Rep) 33; [1986] 1 MLJ 362, Privy Council (per Lord Keith of Kinkel) at p. 365. Counsel for both defendants argue on the strength of these cases that s. 68 of the LAA operates as a bar to the plaintiff bringing this suit to challenge the said order of the court increasing the award of compensation.

[12] Counsel for the plaintiff argues that since the land reference was not made in accordance to s. 38(5) of the LAA, the court's award is illegal and a nullity and ought to be set aside *ex-debito justitiae*. Reliance is made by counsel for the plaintiff on the Federal Court decision in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 for the proposition that where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction then a person affected by the order is entitled to apply to have that order set aside *ex-debito justitiae* in the exercise of the inherent jurisdiction of the court.

[13] Both defendants vehemently argue that the order dated 29 November 2010 is regular and valid and that there is nothing illegal about it. The arguments in this regard revolve around ss. 38(5), 38(6) and 38(7) of the LAA. It would be useful for me to reproduce these subsections.

Section 38(5) LAA reads:

> On receiving any application under subsection (1) the Land Administrator shall, subject to section 39, within six months refer the matter to the Court by reference in Form O.

Section 38(6) LAA provides that:

> Where the Land Administrator has failed to make a reference to the Court within the period specified in subsection (5), the Land Administrator or any person interested may apply to the Court for an extension of the said period.

Section 38(7) LAA states:

> Where the Land Administrator has failed to make a reference to the Court within the period specified in subsection (5) or within any extension of such period under subsection (6), the Court may, on application by any person interested deal with the objection under section 38(1) in such manner as it deems fit, and in order to enable the Court to do so, the Court may give such directions to the Land Administrator or to any person interested as it deems necessary or expedient, and without prejudice to the generality of this power, such directions may include a direction requiring the Land Administrator or any other person to appear before the Court to give evidence, or to produce before the Court such records, or other documents, as the Court may specify.

[14] It is common ground that the land reference was made by the 2nd defendant outside the six months period stipulated in s. 38(5) and that the 2nd defendant did not apply for an extension of time to file the Form O pursuant to s. 38(6). The defendants argue that this by itself does not vitiate the land reference and invalidate the order.

[15] Counsel for the 1st defendant submits that s. 38(5) is merely a procedural requirement stipulating the time period for reference to be made and argues that any contravention of such procedural requirement does not necessarily render an order of a court illegal or void. Counsel relies on the dictum of Gopal Sri Ram FCJ in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd (supra)* where the learned judge held that:

> ... in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex-debito justitiae* to a category of cases involving orders which contravened 'any written law', *the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law.* The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[16] I agree that s. 38(5) of the LAA merely prescribes a procedural time frame for references to be made to the court. Section 38(7) of the LAA also gives the court unfettered discretion to grant extension of time for the filing of Form O. Section 38(5) does not prohibit a reference from being made beyond the prescribed six months. Clearly, this is a procedural requirement as opposed to the issue in *Badiaddin*'s case which involved the contravention of a substantive statutory prohibition in the Malay Reservations Enactment. Further any contravention of s. 38(5) of the LAA in respect of time does not mean that the court is deprived of its jurisdiction to entertain the reference. As held by Sharma J in *Hamidon Ahmad v. Collector of Land Revenue, Jasin* [1969] 1 LNS 51 in relation to an argument that the landowner did not make "a claim to the land administrator in due time" as required under s. 37(1) of the LAA:

> The expression "in due time" appearing in section 37(1) of the Act seems to be nowhere defined. Even if I were to give it the meaning suggested by the learned Legal Adviser that such a claim should be made before or at the time of the hearing of the inquiry by the collector, it does not mean that the court has no jurisdiction to entertain the reference. A plea in limitation or a plea in the nature of limitation does not oust the jurisdiction of the court. Limitation does not in any way touch the question of jurisdiction of the court in respect of the proceedings. It is a fundamental principle of law that where there is right there is a remedy.

[17] The plaintiff's counsel argues that word 'shall' in s. 38(5) mandates the 2nd defendant to make the reference within six months and the failure to do so means that the court is not conferred with jurisdiction. I am unable to accept that argument. I am in agreement with the Sharma J that "a plea in the nature of limitation does not oust the jurisdiction of the court". Therefore, the argument by counsel for the plaintiff that the non-filing of Form O within the six months period has the effect of negating jurisdiction is not tenable in law. The High Court is seized with jurisdiction to hear and determine the reference. This leads me to the issue of whether the statutory provision as regards time in s. 38(5) of the LAA is mandatory or directory.

[18] The Federal Court in *Pow Hing & Anor v. Registrar of Titles, Malacca* [1980] 1 LNS 120 in considering the effect of non-compliance of statutory requirements by a statutory authority affecting the discharge of its duties, held that the court would have to determine whether the transgression related to a mandatory provision or a directory provision. Abdoolcader J (later FCJ) in speaking for the Federal Court held that:

> The matter resolves *ex facie* in the first instance into a conventional invocation and consideration of the traditionally formulated distinction between mandatory and directory requirements in a statute which perhaps underlies the practical and realistic recognition of the fact that adherence to legislative prescriptions cannot always be too literal or rigid lest the machinery of administration is not allowed a little play in its joints. The *locus classicus* explaining this distinction and the consequences for non-compliance in either case is *Howard v. Bodington* (1877) 2 PD 203, 210 and 211. The principle involved is too well-known to require setting out in extenso that part of the judgment of Lord Penzance, Dean of Arches, propounding it (at pages 210-211) but he went on to say that no formula existed to determine whether a particular provision was mandatory or directory (at page 211):
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> > I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

Further at p. 157 at para. F Abdoolcader J quoted with approval the pronouncement of the House of Lords in *London & Clydeside Estates Ltd v. Aberdeen District Council & Anor* [1980] 1 WLR 182, 189, where Lord Hailsham of St Marylebone, LC, in the course of his judgment said (at p. 189):

> When Parliament lays down statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or

> description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint.

[19] This reasoning was again echoed by Lord Woolf MR in *Reg v. Home Secretary For The Home Department, Ex parte Jeyeanthan* [2000] 1 WLR 354 when answering the question as to what should be the approach to regulatory or statutory procedural irregularities held that:

> The issue is of general importance and has implications for the failure to observe procedural requirements outside the field of immigration. The conventional approach when there has been non-compliance with the procedural requirement laid down by statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorised as directory it is usually assumed it can be safely ignored. If it is categorised as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect.

[20] Lord Woolf MR in recognising that the determination of the issue can be more complex than this alluded to Lord Hailsham's approach in *London & Clydeside Estates Ltd v. Aberdeen District Council & Anor (supra)* and opined that:

> Bearing in mind Lord Hailsham L.C.'s helpful guidance I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows.

A

1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)

B

2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of extension of time for compliance as a waiver.

C

3. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of

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focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependant on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not.

It is worth noting that in that case, Lord Woolf MR made this

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very important observation – " ... a requirement may be clearly directory because it lays down a time limit but a tribunal is given an express power to extend the time for compliance." (See p. 359 of the judgment) This is precisely the case with s. 38(5) read with s. 38(7) of the LAA, where the court is empowered to extend

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time.

[21] The approach of the English Court of Appeal in *Reg v. Home Secretary For The Home Department, Ex parte Jeyeanthan (supra)* was adopted with approval by our Court of Appeal in

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Mokhtar Amin v. Mohamed Moktar Omar [2001] 4 CLJ 489 at p. 493 where Gopal Sri Ram JCA (later FCJ) held:

The modern approach towards procedural irregularities and the interpretation of what are usually considered to be mandatory or directory provisions is one of greater flexibility than that adopted

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heretofore. It is exemplified by the following passage in the judgment of Lord Woolf MR in *R. v. Immigration Tribunal ex parte Jeyenathan* [1999] 3 All ER 231. It is a case of the first importance.

I

...

> This, I think, is the approach that should be adopted by our courts. *In my judgment, the non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice.*

[22] Later in *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532 at p. 540 Gopal Sri Ram JCA speaking for the Court of Appeal again reiterated this modern approach towards procedural irregularities in the following terms:

> Lastly, there is the question of the modern approach to the breach of procedural provisions by a litigant. It is to be emphasised that the courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case. So, when a party to litigation complains of breach of a procedural provision by his opponent, *the primary question is not whether the particular provision is to be regarded as mandatory or directory according to the terms of the language in which it is couched. The correct question that the judicial arbiter should ask himself is this: What injustice has the party complaining suffered by reason of the procedural breach?* It is the answer to this question that will ultimately determine whether the court should uphold or reject a procedural complaint.

[23] Applying the principles enunciated in the above cases, I have to determine whether the procedural breach has caused any injustice to the plaintiff? The plaintiff pleaded that the Form O was filed by the 2nd defendant outside the prescribed time of six months in breach of s. 38(5) of the LAA. The plaintiff also pleaded that it was not served the Form P by the court notifying it of the hearing date of the land reference in breach of s. 43 of the LAA. Consequently, the plaintiff contends that the court's award is void and ought to be set aside.

[24] The evidence on the other hand does not support the plaintiff's contention. At the end of his oral testimony, the plaintiff's sole witness Engku Mohd Fauzi Engku Hatim confirmed that the plaintiff was well aware of the 1st defendant's objection to the 2nd defendant's award following the land inquiry. The plaintiff was equally aware that the land reference was pending in court as early as 2007, ie, the same year the Form O was filed in court by the 2nd defendant. The plaintiff had appointed a company called Hasrah Consultancy & Services Sdn Bhd (Hasrah) as its agent to provide services in respect of the land acquisition issues. Hasrah's scope of works set out in letter dated 16 June

2009 clearly shows the agent-principal relationship between Hasrah and the plaintiff. Hasrah wrote a letter dated 9 October 2009 to Jabatan Ketua Pengarah Tanah Dan Galian Persekutuan enquiring as to the status of six land acquisition cases involving the AKLEH project, including the two lots which are the subject matter of this suit. In that letter of 9 October 2009, Hasrah has clearly indicated that they were writing as representative of the plaintiff – "sebagai mewakili syarikat konsesi". The Land Administrator replied to Hasrah informing them that all cases listed in the letter has been referred to the court – "semua kes bantahan dalam senarai yang telah tuan kemukakan ke Jabatan ini telah dirujuk ke Mahkamah Tinggi Kuala Lumpur ... ".

[25] Out of the six cases, in respect of the four cases not involving the 1st defendant herein, consent orders were recorded for three of them in 2009 and 2010 for an increase in compensation ranging between RM70,000 to RM152,040; whilst the court, after a contested hearing, increased the compensation by RM45,254.70 for the fourth case in 2010 together with late payment charges thereon from 24 September 1997 until full settlement. The plaintiff did not raise any objections of non-compliance with ss. 38(5) or 43 of the LAA in respect of these four cases. According to PW1 the plaintiff was quite contend to make payment of these increased compensation.

[26] When the court had originally fixed the land reference for hearing on 21 July 2010. The AGC had *vide* its letter dated 29 June 2010 (exh. D1) addressed *inter alia* to the Jabatan Penilaian dan Perkhidmatan Harta (JPPH), LLM and the 1st defendant, informed the parties of the hearing date on 21 July 2010 and invited the parties to attend a meeting on 7 July 2010 to explore settlement. According to the attendance list or "Senarai Nama" for the aforesaid meeting on 7 July 2010 (exh. D2), one Fadzil Dolmani from Hasrah attended representing the plaintiff. In addition there were two other representatives of the plaintiff present at the said meeting, namely, Norizam Kasirah and Azman Abdullah. LLM's representative also attended this meeting.

[27] Subsequent to that meeting on 7 July 2010, LLM wrote to the plaintiff on 8 July 2010 (exh. P3) requesting the plaintiff's reply to the proposals made at the said meeting. In that letter of 8 July 2010 the court hearing date for the land reference was clearly stated – "... kes ini ditetapkan untuk bicara pada 21 July

2010". The plaintiff replied to LLM by letter dated 12 July 2010 signed by PW1. This reply was copied to AGC, JPPH and the Group Chief Executive of the plaintiff, one Zainudin A Kadir. In this reply, the plaintiff made express reference to LLM's letter of 7 July 2010 and the meeting held on 7 July 2010. In essence, the plaintiff communicated to LLM that it was in agreement with the views of JPPH on the market value of the lands acquired and on the injurious affection – save and except that it requested for interest thereon to be waived since it would be "agak tinggi jika diambil kira faedah 8% setahun daripada tarikh pengeluaran Borang K" and noted that the date of Form K was "4 November 1997".

[28] The parties failed to reach any amicable settlement. The hearing of the land reference was adjourned to 29 November 2010 and took place before the learned Judicial Commissioner sitting with two assessors. The 2nd defendant as the respondent in the land reference opposed the proceedings and was represented by Roslan bin Hj Abu Bakar, Senior Federal Counsel (SFC) assisted by two juniors. In the notes of proceeding, it is recorded that:

(i) that the SFC informed the court that "this acquisition was gazetted on 7 November 1996"; and

(ii) the counsel for the 1st defendant, as the applicant therein, informed the court that "the reference was made in the year 2007".

(iii) all the relevant Forms H, K, N, and O were before the court during the hearing of the land reference. The court also heard submissions on the issue of late payment charges under s. 48 of the LAA.

[29] Though the court was not directly appraised of the fact of the delay in the filing of Form O, nevertheless the court was informed of the date when the acquisition was gazetted and the date on which the Form O was filed. Therefore, the court could easily glean the fact that there was a gap of about 11 years. The court nevertheless proceeded to hear the land reference. Counsel for the plaintiff made very serious allegations of concealment of the fact of the delay in filing Form O by counsel for the 1st defendant. I do not find any evidence of concealment of this fact or any material fact for that matter by counsel for the 1st defendant before the court hearing the land reference. The court delivered

its award (court's award) on 29 November 2010. By its letter dated 14 March 2011, Jabatan Ketua Pengarah Tanah Dan Galian Persekutuan (JKPTG) wrote to LLM enclosing a copy of the courts award for LLM to arrange payment. It is pertinent to note here that the JKPTG and the 2nd defendant had always dealt with LLM as the acquiring authority. The contractual nexus between the plaintiff and the government and its terms were unknown to JKPTG, the 1st defendant or the 2nd defendant. It was LLM that had kept the plaintiff notified of all matters relating to the land acquisition. LLM then on 31 March 2011 wrote to the plaintiff as the ultimate paymaster under the concession agreement enclosing a copy of the courts award and requested payment be made.

[30] As the 2nd defendant did not effect payment of the courts award, the 1st defendant applied to court for issuance of a certificate pursuant to s. 33 of the Government Proceedings Act 1956 (s. 33 Application). The s. 33 Application was fixed for hearing on 14 June 2011. It was then that the plaintiff for the first time showed a direct interest in the land reference and on 31 May 2011 applied for leave to intervene in that proceeding. The plaintiff had also in the meantime filed this suit.

[31] From the evidence it is abundantly clear that the plaintiff knew of the 1st defendant's filing of the "Notis Bantahan" (Form N) and the pending land reference. PW1's initial stand during examination-in-chief that the plaintiff was unaware of the 1st defendant's objection to the initial award at the land inquiry as well as the pending land reference in court flew in the face of his later recantation during cross-examination and the overwhelming documentary evidence to the contrary. The plaintiff also initially took the position in its pleadings and affidavits filed in interlocutory proceedings that Hasrah was not its agent. However, PW1 when confronted with documentary evidence establishing the plaintiff's clear agency relationship with Hasrah made an about turn in his evidence and admitted that Hasrah was the plaintiff's agent. Despite PW1's admission that Hasrah was the plaintiff's agent, the plaintiff's counsel still sought to argue the contrary. In the face of this divergence between the plaintiff's counsel stand and its only witness PW1, I asked PW1 whether it was the plaintiff's position that Hasrah was its agent. PW1 answered in the affirmative. Again counsel for plaintiff sought to contradict PW1. I surmised from

this that counsel had at the least not taken proper instructions from client when filing this suit or at worst was misleading the court. Whatever it may be, it would be proper for me to remind advocates that they owe a paramount duty to the court as officer of the court to advance their client candidly and with full intellectual and professional honesty. The course of justice must not be subverted by willfully misleading the court with fact that the advocates knows to be untrue.

[32] Since there is clear evidence of agency, it is trite law that Hasrah's knowledge as agent is to be imputed to its principal, the plaintiff. See the Court of Appeal case of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639. Therefore, I find that there is ample evidence to show that the plaintiff knew of the land acquisition proceedings from the very beginning when it attended the land inquiry before the Land Administrator to the land reference before the court. The plaintiff chose to attend the land inquiry before the 2nd defendant, partook in the settlement negotiations initiated by the AGC on 7 July 2010 and appointed Hasrah as its agent to advise, monitor and represent the plaintiff in the land acquisition matter. Despite having knowledge of the land reference, the plaintiff chose not to participate in it directly. This was confirmed by PW1 in his evidence. The plaintiff was content to rely on LLM and the AGC in the matter of the land reference. Again this was confirmed by PW1 when he said "Kita bergantung sepenuhnya kepada Jabatan Peguam Negara kerana pada kebiasaannya memang Jabatan Peguam Negara biasanya tahu tentang rujukan ke Mahkamah." PW1 also agreed that plaintiff did not inform the AGC or LLM that they would want to be represented by counsel of their choice at the land reference. Instead of participating in the land reference and contesting the plaintiff's claim for additional compensation, the plaintiff elected to solely rely on the AGC and the recommendations of JPPH.

[33] When considering the evidence in its totality, it became evident that this suit was but a vain attempt to challenge the courts award on false pretense when faced with a marked increase in the amount of compensation awarded by the court as well as the huge interest payable. The plaintiff was dissatisfied with the quantum of award of compensation. This suit was an attempt to circumvent the proviso to s. 49(1) of the LAA which reads:

A (1) Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court:

B **Provided that where the decision comprises an award of compensation there shall be no appeal therefrom.**

There was clear admission on the part of PW1 that this suit was filed purely because the plaintiff was dissatisfied with the increased compensation and the interest awarded. Again the evidence of C PW1 is very telling in this regard. PW1 was evasive to the extent that he refused to answer questions posed during cross-examination. In the course of cross-examination of PW1 it also became clear that the plaintiff had presented a misleading case to the court based on false testimony. PW1 admitted that his D evidence in his witness statement in respect of Hasrah's agency was in stark contrast to that in his affidavit.

[34] PW1 also at first denied that LLM had informed the plaintiff of the hearing date of the land reference in its letter dated 8 July E 2010 but later recanted and agreed that plaintiff had been informed. PW1 also at first denied that the plaintiff had a copy of the LLM's letter dated 8 July 2010. Subsequently, the plaintiff refused its production until the 1st defendant had made an application for its production. Then there was a sudden change in F the plaintiff's position and the letter dated 8 July 2010 was produced and marked as exh. P3. This was a clear attempt by the plaintiff to conceal material evidence both during pre-trial discovery as well as during the course of trial. The production of this letter had the effect of destroying the substratum of the plaintiff's claim.

G **[35]** Further, PW1's answers to the interrogatories in respect of Hasrah's role are also not true. This was again confirmed by PW1 during cross-examination when the contradictions were pointed out to PW1. The plaintiff also failed to call material witnesses. There were several persons still in the employ of the plaintiff or H its related companies who were material witnesses. These include Zainudin A Kadir the Group CEO, Azman Abdullah who had been actively involved in the land acquisition process and Norizam Kasirah who attended the meeting on 7 July 2010. Their evidence would have been more relevant as compared to PW1 who was I merely giving evidence based on records, even then on incomplete

records. I agree with counsel for the 1st defendant that the presumption of adverse inference ought to be invoked against the plaintiff for withholding material evidence and witnesses; in that had these witnesses been called their evidence would not be favourable to the plaintiff. In this regard, I am guided by the judgment of Haidar JCA (later CJM) in *Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 CLJ 179 at p. 303.

[36] In its belated attempt to avoid liability under the concession agreement, the plaintiff has brought this suit premised on false testimony. The irresistible conclusion to be drawn from this is that the plaintiff was seeking to have a second bite at the proverbial cherry. It had always been open to the plaintiff to have intervened and have it added as a party to the substantive motion (the land reference) if it considered itself to be potentially prejudiced by any order that may be made at the land reference. The plaintiff had the requisite knowledge and opportunity to take the necessary steps in this regard. However, with full knowledge of its rights, the plaintiff elected not to be an additional respondent in the land reference. Having made that conscious election, the plaintiff ought not be permitted to change its stance and allowed to make this delayed rear guard attack on the courts award. In *Tradium Sdn Bhd v. Zain Azahari Zainal Abidin & Anor* [1996] 2 CLJ 270 Gopal Sri Ram JCA (later FCJ) in considering a similar situation held as follows:

> In my view, the applicant was no better than a sniper who, whilst concealed and protected by the foliage in which he hides, proceeds to take pot-shots at his unsuspecting opponent. He was not prepared to take on all the risks of a full battle and when the event went against him, decided to change his role. Ought he to be permitted to do this? I think not: for both principle and authority are against him.

[37] The evidence shows that the plaintiff is clearly guilty of unconscionable and unmeritorious conduct. It is trite that equity will not allow a statute from being used as an engine of fraud. Fraud here would be constructive or equitable fraud arising from the plaintiff's unmeritorious and unconscionable conduct as was explained by Mohamed Azmi SCJ in *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266.

[38] This principle was applied by the Court of Appeal in *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26 and the effect of its application was explained by Gopal Sri Ram JCA (later FCJ) in the following terms:

> The doctrine, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon a statutory provision that would defeat his opponents case … The doctrine has been applied to several statutes, including those governing contracts, wills, trusts and assignments. The categories of statutes to which the doctrine may be applied are not closed … The doctrine of estoppel - whether one calls it promissory estoppel, estoppel by encouragement or estoppel by convention does not really matter - has reached such a stage that it may be used to deprive a litigant of the benefit of a procedural statute such as the Limitation Act 1953. The law upon this subject has been stated by Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at pp 244-245 …

[39] Applying these principles of law to the facts of this case, I find that the plaintiff would be estopped by its unconscionable or unmeritorious conduct from pursuing this claim.

[40] The plaintiff also attacks the courts award on the basis of non-service of Form P, which is the notice that the court sends out to parties interested in the land reference. It is common ground that the Form P was not served on the plaintiff. The plaintiff argues that as a result of the non-service of Form P their constitutional rights under arts. 8 and 13 of the Federal Constitution has been breached.

[41] I do not find any merit in this argument. The plaintiff had been present during the land inquiry before the land administrator. At all times, LLM was the body with which the 2nd defendant was liaising in respect of this matter. LLM in turn had kept the plaintiff informed of all developments, including the hearing of the land reference. The plaintiff had also been invited by LLM through the AGC to the meeting on 7 July 2010 to discuss possible settlement. The plaintiff had been content to allow LLM to take the lead through the AGC as was the case with the other four acquisition cases involving AKLEH. Hasrah too had had notice of the proceedings and had attended the meeting on 7 July 2010.

[42] In any event the duty to serve the Form P is on the court and not on the 2nd defendant. The plaintiff had never sought to be a primary party to the land acquisition proceedings. The plaintiff had never informed the 2nd defendant or the court that they are an interested party on whom all notices ought to be served.

[43] Further, the plaintiff was fully aware of the first hearing date of the land reference on 21 July 2010, yet it did not instruct solicitors. The plaintiff was quite happy to rely on the representation of the AGC for LLM. It could have but elected not to directly participate in the land reference. Therefore, it is clear that the plaintiff has not suffered any prejudice or injustice. In *Ng Kim Moi & Ors v. Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus* [2004] 3 CLJ 131, at p. 170 the Court of Appeal in construing the effect of non-service of Form E under the LAA held that:

> But even if mere failure to serve Form E is capable of invalidating an acquisition, in my judgment the failure to serve Form E in this case cannot provide justification for holding that the proceedings for the acquisition of the appellants' land are null and void. *The failure in this case did not prejudice the appellants in any way since they were able to take part in the inquiry and did take part in it with not a whit less advantage then if they had been served with Form E.* The failure in this case cannot even be held to nullify the inquiry. (emphasis added)

[44] In any event s. 56 of LAA provides that "no omission or failure to make due publication of a notice or due service upon persons and parties interested as provided in this part shall invalidate any proceedings under this Act." Therefore, even if the plaintiff ought to have been served with Form P, the non-service does not invalidate the land acquisition or the land reference. See *Hamidon Ahmad v. Collector of Land Revenue, Jasin* [1969] 1 LNS 51; *Chua Ngin Khai & Anor v. Pentadbir Tanah Daerah Pontian, Johor & Anor* [1996] 1 LNS 298; and *Ng Kim Moi & Ors v. Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (supra)*.

[45] In the premise of the foregoing I also find the plaintiff's complaint of breach of statutory duty on the part of the 2nd defendant to be totally unfounded. In *Hu Sepang v. Inspector Keong On Eng & Ors* [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739 Lim Beng Choon J held that:

A It has been said that to establish civil liability for a breach of statutory duty, the plaintiff must show that: (a) the injury he has suffered is within the ambit of the statute, (b) the statutory duty imposes a liability to civil action, (c) the statutory duty was not fulfilled, and (d) the breach of duty has caused his injury.

B **[46]** Further, in *Asia Pacific Land Berhad & 5 Ors v. Datuk Bandar Kuala Lumpur* [2005] 1 LNS 253, Abdul Malik bin Hj Ishak J (now JCA) in construing the essential elements necessary for a cause of action based on breach of statutory duty had held that 'the careless performance of a statutory duty does not in itself give C rise to any cause of action in the absence of either a right of action for breach of statutory duty simpliciter or a common law duty of care in negligence'. The learned judge then adopted into his judgment a passage from *'Clerk & Lindsell on Torts'*, (18th edn), at p. 599 on the essentials of an action for breach of statutory D duty to the following effect:

The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged E to the category of persons that the statute was intended to protect. It is not sufficient simply that the loss would not have occurred if the defendant had complied with the terms of the statute. This rule performs a function similar to that of remoteness of damage.

F **[47]** The plaintiff is contending that it will suffer financially as a result of the court's award. LAA was enacted to afford protection to landowner's whose land was compulsorily acquired by the government. The plaintiff is not within that class of persons. In the premise I do not find that the LAA imposes a statutory duty G on the 2nd defendant *vis-à-vis* the plaintiff whose role is merely to make payment of the award pursuant to an contractual arrangement with the federal government, the terms of which is unknown to both the defendants.

H **[48]** Therefore, the provisions of the LAA and in particular the ss. 38 and 43 do not impose civil liability on the 2nd defendant *vis-à-vis* the plaintiff. If there is delay by the 2nd defendant in filing Form O, then the self-penalising provision in s. 48 of the LAA would kick in and the 2nd defendant will have to pay late I payment charges to the landowner. The fact that the plaintiff

would have to ultimate bear the cost of the acquisition by virtue of the Concession Agreement does not bring it within the class of persons to whom the 2nd defendant owes a statutory duty nor the class of persons whose interest the LAA seeks to protect. In the premise I do not find that the 2nd defendant has breached its statutory duty *vis-à-vis* the plaintiff.

[49] In the final analysis I do not find that any injustice has been caused to the plaintiff and the filing of the Form O beyond the six months period does not render the land reference a nullity as contended by the plaintiff. The plaintiff has failed to prove its pleaded case. The plaintiff's claim of infraction of its constitutional rights of equality before the law and breaches of natural justice are misplaced. Wherefore, I dismissed the plaintiff's claim against both defendants with cost.

[50] Now in respect of the 1st defendant's counterclaim for the tort of abuse of process, my finding is as follows. The essential elements to found an action for the tort of abuse of process are well spelt out in the judgment of Gopal Sri Ram JCA in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340 where the learned judge expounded them as follows:

> ... the essential elements of the tort of abuse of process are these:
>
> (1) The process complained of must have been initiated;
>
> (2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and
>
> (3) The plaintiff must have suffered must have suffered some damage or injury in consequence.

[51] I find that the 1st defendant has proved all the elements of the tort of abuse of process. The process complaint of, ie, the present suit has been initiated by the plaintiff. The purpose of this suit is not to seek genuine legal redress but merely to avoid liability under the concession agreement and to circumvent the proviso to s. 49(1) of the LAA. This is but a clear attempt by the plaintiff to take a second shot at the award of increased compensation to

the 1st defendant by the court, after having previously made a conscious decision to let LLM through AGC's representation to oppose the land reference.

[52] The plaintiff in the course of conducting this trial had through counsel cast serious aspersion on the professional integrity of counsel for both defendants. I found these allegations, accusations and insinuations to be totally devoid of any substance and clearly unwarranted. There was also the attempt by counsel for the plaintiff to serve a subpoena on the lead counsel for the 1st defendant in court whilst proceedings were ongoing. It is a rule of antiquity that no court process shall be served within the court premises. This was conduct unbecoming of an advocate and solicitor for such conduct is also prohibited under the rules of etiquette. In the end the said lead counsel was not even called as a witness. The issuance of the subpoena on a person not intended to be called as a witness is clear abuse of process. It would do well for counsel to think through and be certain that a person is required as a witness before requesting for issuance of subpoena by the court to compel the presence of that person. The issuance of a subpoena wily-nily would attract dire consequences.

[53] The 1st defendant has suffered damage in consequence of the plaintiff's action. The 1st defendant's execution of the court's award has been delayed for more than 11 months by reason of this suit and the 1st defendant has been deprived of the fruits of its litigation. The 1st defendant has also been put to expense in defending this suit. The 1st defendant has established all the necessary elements of the tort of abuse of process.

[54] In the premise, I allowed the 1st defendant's counterclaim with cost and ordered that damages be assessed by the senior assistant registrar. After hearing submissions on cost, I fixed cost at RM80,000 to be paid by the plaintiff to each of the defendants in respect of the plaintiff's claim and RM40,000 to be paid by the plaintiff to the 1st defendant in respect of 1st defendant's counterclaim. There shall be interest on the cost at 4% per annum from the date of judgment to date of full and final settlement and interest on any damages assessed shall be at the rate of 8% per annum from date of filing to date of judgment and 4% from date of judgment till date of full and final settlement.